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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AIRLINES REPORTING CORPORATION,

Plaintiff and Respondent,

v.

EDWARD GHABBOUR,

Defendant and Appellant.

G049798

(Super. Ct. No. 30-2013-00648194)

O P I N I O N

Appeal from orders after judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed in part and reversed in part and remanded with directions.

Edward Ghabbour, in pro. per., for Defendant and Appellant.

Sepehr Omrani for Plaintiff and Respondent.

* * *

In 2004 Plaintiff Airlines Reporting Corporation (ARC) obtained a default judgment against defendant Edward Ghabbour in Virginia. ARC served the lawsuit to an address at which Ghabbour had never resided and failed to serve Ghabbour's attorney, who had already been involved in the parties' dispute and communicated with ARC. In 2013 ARC domesticated the judgment here in California, and Ghabbour moved to vacate the domesticated judgment, contending Virginia had no personal jurisdiction over him in 2004 and that the default judgment was obtained by extrinsic fraud. The court denied the motion, finding the Virginia court had already decided those issues, and thus they were res judicata entitled to full faith and credit. Ghabbour appealed. We conclude that while the issue of personal jurisdiction was decided by the Virginia court, and thus entitled to full faith and credit, the issue of extrinsic fraud was not. We also conclude that Ghabbour made a prima facie case of extrinsic fraud. Accordingly, we reverse and remand for the court to decide in the first instance whether to vacate the domesticated judgment on the basis of extrinsic fraud.

FACTS

In 2003, Ghabbour operated a Nevada travel agency called Atlas Travel & Tours Services (Atlas Travel). ARC was a corporation whose stockholders were the principal scheduled airlines of the United States; it served as a national clearinghouse for issuing the necessary documents to permit travel agents to issue valid passenger tickets to their clients. Ghabbour, on behalf of Atlas Travel, signed an agreement with ARC that permitted Atlas Travel to sell and print valid airline tickets. At the end of each week, Atlas Travel was required to report the amount of ticket sales. "Based on these sales reports, the ARC area bank [was] then authorized to draw a check on the travel agent's account in that amount payable to ARC."

In September 2003, a dispute arose concerning whether Atlas Travel had accurately reported the amount of its ticket sales. As a result, ARC terminated its agreement with Atlas Travel. Atlas Travel retained an attorney in California who responded to ARC by not contesting the termination of the agreement, but disputing the "facts and accusations on some of the liability." The letter from the attorney indicated some tickets may have been misappropriated from Atlas Travel. ARC never responded to the attorney's letter, and thus Ghabbour assumed the matter had been resolved.

Ghabbour retired in February 2004 due to a heart condition and has lived in California since that time.

Unbeknownst to Ghabbour, ARC filed a lawsuit in Virginia against Atlas Travel and Ghabbour in May 2004. The lawsuit, styled as a "Motion for Judgment," alleged 3 counts: breach of contract (against Atlas Travel), breach of fiduciary duty (against all defendants), and conversion (against all defendants). ARC effected service through the Secretary of the Commonwealth of Virginia and provided Atlas Travel's business address, and an address for Ghabbour on Karen Avenue in Las Vegas, Nevada. Service was by certified mail, return receipt requested, on June 1, 2004. (The record does not disclose whether there were return receipts, nor is there any indication that service of process was personally served.) Atlas Travel's attorney was not listed on the proof of service. Ghabbour claims he did not receive actual notice of the lawsuit and that he has never resided at the address ARC provided for service.[1] On July 30, 2004, ARC obtained a default judgment in the amount of $133,220.34, plus fees and costs.

There is no indication in the record that any attempt was made to enforce the judgment until 2010, when ARC obtained an order garnishing Ghabbour's bank account at Bank of America.

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[1] Although not under oath, in a subsequent motion Ghabbour explained that the Karen Avenue address was an old business address for Atlas Travel.

Ghabbour then retained Virginia counsel who filed a motion on April 9, 2010, to quash the garnishment proceedings. Counsel argued that the contents of the Bank of America account were Social Security proceeds and thus exempt from garnishment, and also that the account was located in California and thus not subject to garnishment by a Virginia court. It is unclear in the record how this motion was resolved, but the parties agree it was denied.

Ghabbour's counsel next filed, in Virginia, a motion to vacate default judgment, dated May 21, 2010, on the ground that the Virginia court lacked personal jurisdiction over Ghabbour when it entered judgment in 2004. During the hearing, the court acknowledged it had not read the opposition papers, and the court's questioning suggests it had not read the moving papers either. Counsel for ARC made the following suggestion, which the court ultimately adopted: "[N]ot to short circuit this hearing, I draw the Court's attention to argument one in our opposition, which is that Mr. Ghabbour through [his attorney] appeared in this court just a few weeks ago to contest on the merits, a garnishment. And under Virginia law when a defendant makes any motion which does not involve the question of the Court's jurisdiction, thereby waives all the effects and process and the return thereof." "If the Court agrees with me there, I can save you some time." "By entering a general appearance at a matter, you necessarily submit to jurisdiction and therefore waive your opportunity to appear specifically." Ghabbour's counsel responded by arguing that the 2004 default judgment and the 2010 garnishment proceedings were separate actions, and there was no appearance in the 2004 action. The court disagreed, finding that because the garnishment action was based on the 2004 judgment, a general appearance in the 2010 garnishment action waived personal jurisdiction objections to the 2004 judgment.

In May 2013, ARC applied to have the Virginia judgment domesticated in California against Ghabbour and Atlas Travel. Pursuant to Code of Civil Procedure

section 1710.25, subdivision (a),[2] the clerk entered judgment, triggering a 30-day period for the judgment debtors to move to vacate the judgment. (§ 1710.40, subd. (b).)

In response, Ghabbour, acting in propria persona, filed three motions aimed at essentially the same goal. On June 17, 2013, he filed a "Motion to Invoke & Vacate Default Judgment Proceedings, On Sister State Judgment." This motion was based on the State of Virginia lacking personal jurisdiction over Ghabbour. Also on June 17, Ghabbour filed a "Motion to Quash/Dismiss Service of Notice of Entry of Judgment Proceedings on Sister-State Default Judgment." This motion made similar arguments. Four months later, Ghabbour filed a "Motion to Vacate Default and Default Judgment for Extrinsic Fraud." He raised a number of arguments, one of which was that he had retained an attorney in 2003 and his attorney had never been notified of the lawsuit. He also argued that the address at which he was served had never been his residential or work address. Ghabbour also argued the Virginia court never had personal jurisdiction over him, but the motion was principally focused on issues of extrinsic fraud.

ARC filed identical opposition papers to the first two motions. The opposition papers argued that because a Virginia court had already ruled on Ghabbour's claim that Virginia lacked personal jurisdiction in 2004, California courts must give full faith and credit to that ruling and cannot revisit the jurisdictional issue. The opposition papers also address alleged improprieties concerning service on Atlas Travel.[3] The record before us does not contain any opposition to the motion based on extrinsic fraud (and, for that matter, the ARC's brief completely ignores the issue as well).

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[2] All statutory references are to the Code of Civil Procedure.

[3] Atlas Travel is not a party to this appeal and thus we do not address any issues concerning service on Atlas Travel.

Ultimately, the court ruled in ARC's favor, stating, "it appears that the court in Virginia considered the question about whether there had been proper service and whether there was proper jurisdiction for these claims and the court in Virginia disagreed with you, and that was a full and fair hearing. They have good judges in Virginia. I don't think we give you a second chance because you had one chance to present these claims." When Ghabbour began to mention the extrinsic fraud, the court stated, "I'm sure you told the judge in Virginia that -- [¶] Mr. Ghabbour: No. [¶] The Court: -- and all of the other points you are making were considered by the good judge in Virginia." Ghabbour responded, "I did not, your honor, have a chance to or opportunity." Ghabbour timely appealed.

DISCUSSION

This appeal essentially raises two issues: Are we bound to give full faith and credit to a Virginia court's determination that it had personal jurisdiction to issue the 2004 judgment? And, under principles of res judicata and full faith and credit, was Ghabbour barred from collaterally attacking the 2004 judgment in California on grounds of extrinsic fraud? We conclude the trial court was correct as to the first issue, but erred as to the second issue.

The first issue is settled in California. "If . . . 'the court of the first state has expressly litigated the question of jurisdiction, its determination is res judicata and is itself protected by the full faith and credit clause.'" (*Bank of America v. Jennett* (1999) 77 Cal.App.4th 104, 114.) There can be no question on this record that Ghabbour submitted the issue of personal jurisdiction to the Virginia court in 2010, and, right or wrong, it decided the issue.

Lack of jurisdiction, however, is not the only basis upon which to attack a domesticated judgment. "A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment . . . ." (§ 1710.40, subd. (a).) "Common defenses to enforcement of a sister state judgment include the following: the judgment is not final and unconditional (where finality means that no further action by the court rendering the judgment is necessary to resolve the matter litigated); *the judgment was obtained by extrinsic fraud*; the judgment was rendered in excess of jurisdiction; the judgment is not enforceable in the state of rendition; the plaintiff is guilty of misconduct; the judgment has already been paid; suit on the judgment is barred by the statute of limitations in the state where enforcement is sought." (Cal. Law Revision Com. com., 20 West's Ann. Code Civ. Proc. (2007 ed.) Foll. § 1710.40, p. 385.)

"The seminal definition of extrinsic fraud is found in *United States* v. *Throckmorton* (1878) 98 U.S. 61, 65–66, [25 L.Ed. 93]: 'Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. [Citations.] [¶] In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.' [¶] We recently observed that '[e]xtrinsic fraud is a broad concept that "tend[s] to encompass

almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing.'" [Citations.] The clearest examples of extrinsic fraud are cases in which the aggrieved party is kept in ignorance of the proceeding or is in some other way induced not to appear. [Citation.] In both situations the party is 'fraudulently prevented from presenting his claim or defense.'" (*Estate of Sanders* (1985) 40 Cal.3d 607, 614.) "It does not seem to matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342.) "The essence of extrinsic fraud is one party's preventing the other from having his day in court." (*City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1067.)

Here, Ghabbour has made a prima facie case of extrinsic fraud. In serving Ghabbour with the 2004 lawsuit, ARC utilized an address that, according to Ghabbour, has never been his residence and was instead a prior, defunct business address of Atlas Travel. Moreover, ARC knew that Ghabbour had retained an attorney to represent him in the dispute with ARC, yet, so far as the record reveals, ARC never served the attorney with the 2004 lawsuit. Nor is there evidence that ARC notified the opposing attorney informally either. Such a tactic has been variously described as a violation of the attorney's ethical obligation, or, at minimum, a professional discourtesy in California. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 701 ["such warning is at the least an *ethical* obligation of counsel"]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 5:68, p. 5-18; but see *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038 ["While as a matter of professional courtesy counsel should have given notice of the impending default, and we decry this lack of professional courtesy [citation], counsel was under no legal obligation to do so"].) Whether it is actually an ethical obligation or not is of no matter to this appeal. As the authorities above make clear, all that is required for extrinsic fraud is for one party to cause the other party to be unaware of the lawsuit. By serving an incorrect address and failing to notify Ghabbour's attorney, ARC caused Ghabbour to be unaware of the lawsuit against him.

The trial court never reached the issue of extrinsic fraud, apparently concluding that the Virginia court had already addressed the issue and thus it was res judicata. We conclude that was error.

"As a general matter, it is unquestioned that a trial court's ruling on an ordinary motion is not res judicata." (*Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 770.) There is some older authority to the effect that a ruling on a motion can be res judicata if it represents a final determination of the merits. (See 44 Cal.Jur.3d (2011) Motion Procedure, § 41, p. 1045 ["It has been said that a decision on a motion is res judicata when the decision does not involve a mere question of proper form or time of a proceeding, but determines a substantial matter of right on which the parties have a right to be heard on issues of law or fact, and these issues are necessarily decided by the court as the basis of the order it finally enters, granting or denying the relief sought"].) However, a long line of cases has treated motions to vacate a judgment under the auspices of collateral estoppel rather than res judicata more generally.

A case closely on point is *Groves v. Petersen* (2002) 100 Cal.App.4th 659 (*Groves*), which holds a party may bring an independent suit in equity to vacate an underlying default judgment even if a motion to vacate the default judgment was denied in the underlying case. In *Groves* a judgment debtor filed an independent suit in equity to set aside a prior default judgment on the ground that he was not properly served in the prior suit. (*Id.* at p. 661.) "The trial court sustained, without leave to amend, a demurrer to Groves's complaint, on the ground it is barred by collateral estoppel because appellant's prior motion in the underlying case to set aside the default and default judgment on the same ground had been denied." (*Ibid*.) The Court of Appeal reversed "because a long line of cases holds the prior denial *of a motion in the underlying case* to set aside a default and default judgment has no collateral estoppel effect to bar an *independent action in equity* directly attacking the prior judgment." (*Ibid.*)

In the underlying suit, Groves (the judgment debtor) and the business he operated was sued for fraudulently inducing the underlying plaintiffs to purchase an interest in a note. A default judgment was entered. Groves filed a motion to vacate the default judgment asserting, among other things, that he was not properly served because, by the time of the complaint, he had closed his business and moved out of state, and thus was no longer living or working at the address that the complaint was mailed to. He did not discover the default judgment until the judgment creditor initiated collection activities. (*Groves*, *supra*, 100 Cal.App.4th at p. 662.) The underlying trial court denied the motion, finding the motion untimely and finding insufficient evidence of extrinsic fraud. (*Id.* at p. 665.)

Groves filed the action subject to the appeal — a suit in equity to set aside the prior default judgment. (*Groves*, *supra*, 100 Cal.App.4th at p. 665.) The trial court sustained a demurrer without leave to amend on the ground of collateral estoppel. (*Id.* at p. 666.)

Reversing, the Court of Appeal explained the rationale permitting a second suit even where a prior motion to vacate had been denied: "As explained in the Supreme Court's early case and reiterated in the recent case in this line, the reason for this rule is: in the motion procedure the moving party is limited to presenting ex parte affidavits of voluntary witnesses, unless the trial court in its discretion permits a greater latitude. The party does not have the right to produce oral testimony or to compel witnesses to attend for deposition or cross-examination. In other words, the motion procedure does not involve all the aspects of full litigation. The remedies of a motion in the underlying case and an independent action in equity are cumulative. The motion procedure is simpler and more convenient. The party should be entitled to resort first to the convenient and expeditious remedy, without penalty of the bar of collateral estoppel if the motion is denied. Despite denial of the motion, the party may then pursue an independent action

that affords the party all the advantages of a regular trial of the issue." (*Groves*, *supra*, 100 Cal.App.4th at pp. 667-668.)

In the alternative, the *Groves* court held it would reach the same result on the ground that the propriety of service was not decided in the underlying lawsuit. The underlying court had denied the motion to vacate the default judgment on the ground that it was untimely and there was no evidence of extrinsic fraud — thus it never reached the merits of the propriety of the service of process. Because collateral estoppel requires that an issue not only be litigated but also decided, there was no estoppel. (*Groves*, *supra*, 100 Cal.App.4th at p. 667 ["Under collateral estoppel, a prior judgment between the same parties operates as an estoppel or conclusive adjudication as to those issues that were *actually litigated and necessarily determined* in the prior action"], *id*. at p. 670.)

Here, section 1710.40 contemplates a "motion to vacate the judgment," rather than a full trial contemplated by a suit in equity.[4] Thus the first rationale of *Groves* does not apply here. However, *Groves's* alternative rationale — that the issue was not actually decided — does apply.

The Virginia court decided a narrow issue: whether making a general appearance in 2010 to contest a garnishment order constituted a waiver of any personal jurisdiction arguments concerning the 2004 judgment. This had nothing to do with extrinsic fraud. Moreover, although we are bound to uphold the Virginia court's narrow ruling, we note the procedure that court employed was less than ideal. The court never read the moving or opposing papers and made a rather complicated jurisdictional ruling from the bench without reviewing or relying on any authority whatsoever. We are not inclined to give that ruling a broader interpretation than is necessary. Accordingly, the trial court erred in concluding the Virginia court's ruling barred Ghabbour's extrinsic fraud claim.

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[4] Of course, although not required to, the court has discretion to hold an evidentiary hearing. (*Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 483.)

Because the trial court never reached the issue of extrinsic fraud, we remand to the trial court to resolve that issue in the first instance.

DISPOSITION

The court's orders denying Ghabbour's motions to vacate the default and default judgment based on the Virginia court's lack of personal jurisdiction are affirmed. The court's order denying Ghabbour's motion to vacate default and default judgment for extrinsic fraud in procuring the Virginia judgment is reversed. The matter is remanded to the trial court to decide, in the first instance, whether to vacate the domesticated judgment based on extrinsic fraud in procuring the Virginia judgment. Ghabbour shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.